RECEIVED
MAY 9 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAY 6 1983
Alexander L. Stevas, Clerk

October Term, 1982

No. 82-6733

---

PAUL EDWARD MAGILL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA**

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Fl 32302
904/224-3636

ATTORNEY FOR PETITIONER

## TABLE OF CONTENTS


| | Page No. |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3 |
| HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW | 4 |
| STATEMENT OF THE CASE | 5 |
| A. The Facts | 5 |
| B. Trial Proceedings | 7 |
| C. The Direct Appeal | 9 |
| D. The Sentencing After Remand | 10 |
| E. The Appeal after Remand | 11 |
| REASONS FOR GRANTING THE WRIT | 11 |
| 1. THE IMPOSITION OF THE DEATH PENALTY UPON A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS | 11 |
| 2. THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY UPON YOUTHFUL OFFENDERS DEPRIVED PETITIONER OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS | 16 |
| 3. THE EXCLUSION OF PETITIONER'S PENALTY PHASE TESTIMONY REGARDING HIS REMORSE FOR THE ACT CONSTITUTES AN IMPROPER RESTRICTION UPON THE PRESENTATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS | 19 |
| 4. THE AFFIRMANCE BY THE FLORIDA SUPREME COURT OF THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES PRIOR TO THE REMAND TO THE TRIAL COURT FOR A NEW SENTENCING HEARING VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS | 22 |

5. THE FLORIDA SUPREME COURT IN AFFIRMING THE IMPOSITION OF THE DEATH PENALTY IN THE PRESENT CASE HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS 24

6. THE FLORIDA SUPREME COURT ERRED IN APPROVING THE USE OF THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL OF WHICH WERE PROVEN BY THE SAME EVIDENCE 31

7. THE EXECUTION OF THE PETITIONER WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIEW OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN THIS CASE 33

CONCLUSION 35

## TABLE OF CITATIONS


| Cases | Page Nos. |
|---|---|
| Adams v. Texas, 448 U.S. 38 (1980) | 18 |
| Alvord v. State, 322 So.2d 533 (Fla. 1975) | 26, 29 |
| Antone v. State, 382 So.2d 1205 (Fla. 1980) | 30 |
| Armstrong v. State, 399 So.2d 953 (Fla. 1981) | 30 |
| Beck v. Alabama, 447 U.S. 625 (1980) | 12 |
| Bellotti v. Baird, 443 U.S. 662 (1979) | 13 |
| Boulden v. Holman, 394 U.S. 478 (1969) | 16 |
| Brown v. State, 381 So.2d 690 (Fla. 1980) | 31 |
| Coker v. Georgia, 433 U.S. 584 (1977) | 12 |
| Cooper v. State, 336 So.2d 1133 (Fla. 1976) | 30 |
| Davis v. Georgia, 429 U.S. 122 (1976) | 17 |
| Daugherty v. State, ____ So.2d _____, 7 F.L.W. 438 (Fla. 1982) | 30 |
| Demps v. State, 395 So.2d 501 (Fla. 1981) | 30 |
| Eddings v. Oklahoma, 455 U.S. 104 (1982) | 11 |
| Enmund v. Florida, _____ U.S. _____, 73 L.Ed.2d 1140 (1982) | 12 |
| Enmund v. State, 399 So.2d 1362 (Fla. 1981) rev'd 102 S.Ct. 3368 (1982) | 30 |
| Fleming v. State, 374 So.2d 954 (Fla. 1979) | 27 |
| Ford v. State, 374 So.2d 496 (Fla. 1979) | 28 |

| | |
|---|---|
| Furman v. Georgia 408 U.S. 238 (1972) | 30, 31 |
| Gibson v. State, 351 So.2d 948 (Fla. 1977) | 28, 29 |
| Godfrey v. Georgia, 446 U.S. 420 (1980) | 25 |
| Gregg v. Georgia, 428 U.S. 153 (1976) | 12, 34 |
| Halliwell v. State, 323 So.2d 557 (Fla. 1975) | 28 |
| Hargrave v. State, 366 So. 2d 1 (Fla. 1978) | 28 |
| Harvard v. State, 375 So.2d 833 (Fla. 1978) | 28 |
| Holmes v. State, 374 So.2d 944 (Fla. 1979) | 30 |
| Jackson v. State, 359 So.2d 1190 (Fla. 1978) | 30 |
| Kent v. United States, 383 U.S. 541 (1966) | 13 |
| King v. State, 390 So.2d 315 (Fla. 1980) | 25 |
| Lewis v. State, 377 So.2d 640 (Fla. 1979) | 30 |
| Lewis v. State, 398 So.2d 432 (Fla. 1981) | 25, 26 |
| Lockett v. Ohio, 438 U.S. 586 (1978) | 20, 21 |
| Magill v. State, 386 So.2d 1188 (Fla. 1980) cert. den. 450 U.S. 927 (1981) | 1, 10, 14, 21, 22 |
| Magill v. State, _____ So.2d _____, (Fla. 1983) | 1, 11 |
| Maxwell v. Bishop, 398 U.S. 478 (1969) | 16 |
| May v. Anderson, 345 U.S. 528 (1953) | 12 |
| Meeks v. State, 339 So.2d 186 (Fla. 1976) | 30 |
| Middleton v. State, _____ So.2d _____, 8 F.L.W. 9 (Fla. 1982) | 30 |

Proffitt v. Florida. 428 U.S. 242 (1976) 12, 23, 27, 28, 29

Raulerson v. State, 358 So.2d 826 (Fla. 1978) 28

Riley v. State, 366 So.2d 19 (Fla. 1978) 29

Riley v. State, 413 So.2d 1173 (Fla. 1982) 30

Rutledge v. State, 374 So.2d 975 (Fla. 1979) 25

Sawyer v. State, 313 So.2d 680 (Fla. 1975) 30

Shriner v. State, 386 So.2d 525 (Fla. 1980) 30

State v. Dixon, 283 So.2d 1 (Fla. 1973) 24, 25, 27, 28, 29

Songer v. State, 322 So.2d 481 (Fla. 1975) 30

Swan v. State, 322 So.2d 485 (Fla. 1975) 27

Tafero v. State, 402 So.2d 355 (Fla. 1981) 30

Thompson v. State, 328 So.2d 1 (Fla. 1976) 14

Thompson v. State, 389 So.2d 197 (Fla. 1980) 25

Vasil v. State, 374 So.2d 465 (Fla. 1979) 14

Williams v. State, 386 So.2d 538 (Fla. 1980) 25

Witherspoon v. Illinois, 391 U.S. 510 (1968) 16, 17, 18, 19

Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) cert. den. 434 U.S. 1088 13

Zeigler v. State, 402 So.2d 365 (Fla. 1981) 30

Florida Statutes


| | |
|---|---|
| Fla. Stat. Ann. 39.01(7) | 15 |
| Fla. Stat. Ann. 562.111 | 16 |
| Fla. Stat. Ann. 743.07 | 15 |
| Fla. Stat. Ann. 913.13 | 17 |
| Fla. Stat. Ann. 921.141(5)(e) | 22 |
| Fla. Stat. Ann. 921.141(5)(h) | 22, 24 |
| Fla. Stat. Ann. 921.141(6)(g) | 7 |


Other Table of Authorities


AMERICAN LAW INSTITUTE, MODEL PENAL CODE §210.6(1)(d) (Proposed Official Draft, 1962) 15

RECEIVED
MAY 6 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAY 6 1983
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

---

PAUL EDWARD MAGILL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI**
**TO THE SUPREME COURT OF FLORIDA**

Petitioner, Paul Edward Magill, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Florida entered in these proceedings on March 10, 1983.

## OPINIONS BELOW

The Judgment and Opinion of the Florida Supreme Court affirming the Petitioner's first degree murder conviction and remanding the case for a new sentencing hearing is reported as Magill v. State, 386 So.2d 1188 (Fla. 1980) cert. den. 450 U.S. 927 (1981). (Appendix B).

The Judgment and Opinion of the Florida Supreme Court in Magill v. State, ___ So.2d ___ (Fla. 1983) affirming Petitioner's sentence of death in the appeal after remand is not yet reported. (Appendix D).

## JURISDICTION

The Judgment and Opinion of the Supreme Court of Florida sought to be reviewed by this Petition was entered on March 10, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1247(3) Petitioner having asserted below and asserting here a deprivation of rights guaranteed by the Constitution of the United States.

## QUESTIONS PRESENTED

1. Whether the imposition of the death penalty upon a youth who was under the age of eighteen at the time of the offense would constitute excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments.

2. Whether the exclusion for cause of a juror who expressed a conscientious objection to the imposition of the death penalty upon youthful offenders deprived Petitioner of his Sixth and Fourteenth Amendment rights.

3. Whether the exclusion of Petitioner's penalty phase testimony regarding his remorse for the act constitutes an improper restriction upon the presentation on non-statutory mitigating circumstances in violation of the Eighth and Fourteenth Amendments.

4. Whether the affirmance by the Florida Supreme Court of the Trial Court's findings as to the aggravating circumstances prior to the remand to the Trial Court for a new sentencing hearing violated Petitioner's Eighth and Fourteenth Amendment rights.

5. Whether the Florida Supreme Court in affirming the imposition of the death penalty in the present case has adopted such a broad and vague construction of the term "especially

heinous, atrocious and cruel" as to violate the Eighth and Fourteenth Amendments.

6. Whether the Florida Supreme Court erred in approving of the use of three separate agrravating circumstances all of which were proven by the same evidence.

7. Whether the execution of the Petitioner, in view of the overwhelming mitigating circumstances in his case, would constitute excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed...

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted...

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [Nor] shall any state deprive any person of life, liberty or property without due process of law.

This case also involves the following provisions of the statutes of the State of Florida which are set forth in Appendix

E to this Petition. Fla.Stat.Ann. §782.04, §921.141.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The question of whether the death penalty can be applied constitutionally to an offender under the age of eighteen was raised during the oral argument in the appeal to the Florida Supreme Court following remand. The issue was addressed in the dissenting opinion of Mr. Justice Boyd. (Appendix D).

2. At trial, defense counsel objected to the exclusion for cause of a juror who expressed conscientious opposition to the imposition of the death penalty upon youthful offenders. The argument was raised and expressly rejected in the direct appeal. (Appendix B).

3. Petitioner contended on the direct appeal that the Trial Judge erred in excluding the penalty phase testimony concerning the Petitioner's feelings of remorse. The Court affirmed the exclusion of the testimony on the ground that it was irrelevant. (Appendix B).

4. The argument that the Florida Supreme Court was in error in affirming the aggravating circumstances prior to remanding the case for a new sentencing hearing was made specifically in the Petition for Rehearing of the direct appeal, and generally throughout the Petitioner's Brief on the appeal to the Florida Supreme Court after the remand.

5. Petitioner's contention that the Florida Supreme Court has, in the present case, adopted an unconstitutionally broad and vague interpretation of the term "especially heinous, atrocious and cruel" was made and expressly rejected in the appeal after remand. (Appendix D).

6. The contention that the Trial Judge improperly cumulated the aggravating circumstances supporting the impostion of the

death penalty was made and generally rejected in the appeal after remand. The issue was directly addressed in the dissenting opinion of Mr. Justice Boyd. (Appendix D).

7. The argument that the death penalty cannot be applied constitutionally in view of the overriding mitigating circumstances was made and generally rejected in the appeal after remand. (Appendix D).

## STATEMENT OF THE CASE

### A.

### The Facts

At approximately 8:00 p.m. on December 23, 1976, Danny Hall, age seventeen, rode his bicycle to the Jiffy Food Store located on Highway 27 south of Belleview, Florida. He was halfway in the door of the convenience store when Petitioner, whom he had seen before, turned around and pointed a gun and told him to leave. Tr-254-257.[1] Danny Hall then left the store and rode his bike to the top of the hill where he watched Petitioner take a woman, known to him as Karen Young, from the store. Tr-258-259.

Hall observed Petitioner and Young getting into a Mustang automobile which proceeded toward Belleview. Several other customers testified that they observed a young man and woman in a Mustang automobile just prior to the time they entered the store and found it to be unattended. Tr-306-309. The customers were greeted by Danny Hall who came running back to the store to call the Belleview police. Tr-263,306.

Officer John Harrison, of the Belleview Police Department received a radio call at approximately 8:17 p.m. alerting him of

---

[1] In this Petition , "R" is a reference to the One Volume record of the Pleadings and Orders, "Tr" is a reference to the Four Volume trial transcript, and "S" is a reference to the sentencing transcript.

the robbery and abduction and advising him of the description of the vehicle. Tr-286-287. Harrison ultimately encountered the Mustang automobile described in the radio call and turned on his blue light in an attempt to stop it. Tr-292-294. The driver of the Mustang, however, increased the speed of the vehicle and headed back toward the Jiffy Food Store. After a brief chase, Officer Harrison forced the Mustang off the road approximately two tenths of a mile north of the store. Tr-294. The driver of the vehicle, later identified as the Petitioner, got out of the car and ran to the rear where he was stopped by Officer Harrison. Tr-295.

Deputy Eddie Wright, Jr., of the Marion County Sheriff's Department, was at the Jiffy Food Store and had watched Officer Harrison stop the vehicle and pat down the Petitioner. Tr-315-316. Deputy Wright proceeded to the area and advised Petitioner of his Miranda rights. Tr-317. After Wright told Petitioner that his car matched the description of a vehicle involved in a robbery and that he had run from a police vehicle, Petitioner started to sob and said that he did it. Tr-318. Wright asked what he had done and Petitioner said that he had robbed, raped and killed her. Wright placed the Petitioner in his vehicle and called for an ambulance. He requested Petitioner to take him to where the girl was in hopes that she might not be dead. Petitioner said he was sure she was dead; that he had taken care of that. Tr-318. Following the Petitioner's directions, Deputy Wright then drove to a secluded woody spot near Jaybird Point at Smith Lake where he found the body of Karen Sue Young. Tr 318-319.

Later that evening, Petitioner gave a tape recorded statement to Captain Gerard King of the Marion County Sheriff's Office. Petitioner admitted that he robbed Ms. Young of an undetermined amount of money, and that he had intercourse with her. Tr-346-348. Petitioner told Captain King that he shot the

victim three times with a .44 caliber pistol when he realized she could identify him. Tr-315-352. He then tried to drag the body into the bushes and put the gun in the trunk of his car. Tr-354.

A consent search of the vehicle prodcued a .44 caliber pistol Tr-359, 366, identified by the firearms expert as the weapon which discharged five spent .44 caliber cartridge cases found at the scene of the crime. Tr-406.

B.

**Trial Proceedings**

Petitioner was charged by Indictment with the crimes of first degree murder, sexual battery, and armed robbery. R-1-2. Although he was seventeen years old and therefore a juvenile under Florida law, he was tried as an adult.[2] A plea of Not Guilty was entered and the case was scheduled for a jury trial in Marion County, Florida on March 21, 1977.

During the jury selection, the prosecutor asked a prospective juror if the fact that Petitioner was under the age of twenty one would affect his ability to return a verdict of guilty or a recommendation of death. Tr-22. Defense counsel objected to this line of questioning, Tr-22, but the objection was overruled by the Trial Judge. Tr-22,23.

Following the approval of this procedure, the prosecutor began to elicit the opinions of each of the prospective jurors as to the applicablity of the death penalty to those under the age of twenty-one. Prospective Juror Best, who served on Petitioner's jury, promised the prosecutor "that the mere fact"

---

[2] Under Florida law a juvenile is automatically tried as an adult if he is charged by Indictment with a capital offense. Fla. Stat. Ann. 39.02 (5) (c) (1).

that this [Petitioner] may be under twenty-one would not automatically make her recommend mercy to the Court. Tr-28. Likewise, prospective Juror Hayward, who served on the panel, affirmed that the "mere fact that this [Petitioner] was under twenty one" would not influence his vote for or against capital punishment, Tr-30, and that he would judge Petitioner's crime just like anyone else. Tr-31. Finally, prospective Juror Rankin, who also served on the jury, affirmed that the "mere fact that [Petitioner] may be under twenty-one" would not influence him in voting for or against capital punishment. Tr-31.

Prospective Juror Bonner responded to the question of whether the age of the Petitioner might affect her ability to make a finding of guilt or recommendation of death and answered in the affirmative. Tr-35. Mrs. Bonner asked the prosecutor, during the questioning session how old Petitioner was, Tr-35, and when the prosecutor declined to answer, Tr-36, the juror informed him that Petitioner's age would operate as a bar to a finding of guilt. Tr-36. Following that answer, Mrs. Bonner was excused for cause over the objection of defense counsel. Tr-37.

When a panel of jurors was qualified, the State called the witnesses at the scene of the Jiffy Food Store, the police officers, and various technical witnesses. Together, these witnesses established the facts as set forth above.

Petitioner took the stand on his own behalf and after relating a history of psychological problems, told the jury that he committed the offenses impulsively. Tr-420. He said that at the time, he did not feel that he had any control over his actions, Tr-420-422, and that it was "totally against [his] thinking to harm a person like that." Tr-428.

The jury returned a verdict finding the Petitioner guilty as charged of the offenses of murder in the first degree, involuntary sexual battery, and armed robbery. R-66,66a,66b. The State produced no evidence of aggravating circumstances in the

penalty phase proceedings which began shortly after the verdicts were announced. Tr-498. Petitioner testified on his own behalf during this portion of the trial, Tr-553, and called other witnesses to establish the existence of certain mitigating factors.

Petitioner was asked by defense counsel how he felt about having committed the offense in question, but the prosecutor's objection to the question was sustained. Tr-566. Defense counsel then asked the Petitioner if he had any statement he wished to make to the jury concerning the offense, Tr-566, but the prosecutor's objection to that question was likewise sustained. Tr-566. The Trial Judge explained to the jury that he was "sustaining the objections because [the questions] fall without purview of these factors set forth by the legislature, which you should consider in mitigation". [sic] Tr-566.

The jury returned an advisory verdict recommending the imposition of the death penalty, Tr-612, which was ultimately accepted by the Trial Court at sentencing. The Court found as aggravating circumstances; (a) that "three felonies" were committed by the Petitioner, (b) that the capital felony of murder was committed while the Petitioner was "engaged in the commission of, or flight after committing, the crime of robbery and rape", (c) that the capital felony was "especially heinous, atrocious and cruel", and (d) that the capital felony was committed in "connection with the crime of robbery which was perpetrated for pecuniary gain." (R-78-79) (Appendix A). The Trial Judge found "no mitigating circumstances which outweigh the ...aggravating circumstances." (R-78-79) (Appendix A).

C.

**The Direct Appeal**

The Florida Supreme Court rejected all of the Petitioner's arguments as to the validity of the conviction, including his argument that the Trial Judge committed constitutional error in excusing Juror Bonner for cause. Magill v. State, 386 So.2d 1190 (Fla. 1980) (Appendix B). Thus, the Supreme Court affirmed the Petitioner's convictions.

The Court rejected the argument that the Trial Judge erred in limiting the Petitioner's penalty phase testimony, but the Court was of the opinion that the Trial Judge erred generally in the failure to "list the mitigating circumstances which he may or may not have considered". Magill at 1191. For that reason, the sentence of death was vacated and the case remanded to the Trial Judge for a new sentencing hearing. Notwithstanding the Order vacating the death sentence, the Florida Supreme Court expressly considered and approved each of the aggravating circumstances applied by the Trial Judge.

D.

**The Sentencing After Remand**

On January 26, 1981, following the new sentencing hearing, the Trial Judge entered a new Judgment supported by written Findings of Fact. (Appendix C). He concluded that the same four aggravating circumstances were applicable, and found the existence of the following three mitigating circumstances: (a) that the Defendant Magill was 17 years of age at the time of the offense (b) that the Defendant had no significant prior criminal record and (c) that the Defendant's father had passed away on December 28, 1975. (Appendix C).

The ultimate conclusion of the Trial Judge was that there were "insufficient mitigating circumstances to outweigh the aggravating circumstances". (Appendix C). Accordingly, the

Trial Judge re-sentenced the Petitioner Magill to death. (Appendix C).

E.

## The Appeal After Remand

The second appeal to the Florida Supreme Court involved only the validity of the Petitioner's sentence. On March 10, 1983, the Court entered its four-to-one opinion rejecting each of the Petitioner's sentencing arguments and affirming the imposition of the sentence of death. Magill v. State, _____ So.2d _____ (Fla. 1983). (Appendix D).

F.

## Reasons for Granting the Writ

### One

THE IMPOSITION OF THE DEATH PENALTY UPON A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This case presents the issue left unresolved by the Court's decision last term in Eddings v. Oklahoma, 455 U.S. 104 (1982). The Court granted certiorari in that case to review the same argument, but the issue was rendered moot by the Court's decision to vacate the death sentence in question upon another ground. The Petitioner Magill respectfully submits that the Court should once again accept the issue for review and that the Court should ultimately hold that the imposition of a sentence of death for an offense committed by a child below the age of eighteen constitutes cruel and unusual punishment forbidden by the Eighth

and Fourteenth Amendments.

The Court held in Gregg v. Georgia, 428 U.S. 153 (1976) that the death penalty does not invariably violate the Eighth Amendment proscription against cruel and unusual punishment and in Proffitt v. Florida, 428 U.S. 242 (1976) that the Florida Capital Sentencing Statute was not facially unconstitutional. These decisions firmly establish the general rules but this Court has recognized that there are indeed exceptions.[3] This case demonstrates the need for an exception in the case of children convicted of capital offenses.

The fact that the constitution does not generally prohibit states from treating juveniles as adults does not mean that every form of punishment acceptable for an adult would be acceptable for a junvenile certified for trial as an adult. This Court has consistently recognized that "death as a punishment is unique in its severity and irrevocability", Gregg, supra, and that the death penalty commands a special Eighth Amendment concern. Gardner v. Florida, 430 U.S. 349 (1977), Beck v. Alabama, 447 U.S. 625 (1980). Thus it follows that the death penalty is not neccessarily acceptable for citizens who are legally defined by the State as "children", simply because they might, in certain situations, be subject to penalties approved for adults.

The Court has long recognized that as to some matters the Constitution requires a distinction between children and adults. As Mr. Justice Frankfurter said in May v. Anderson, 345 U.S. 528 (1953), "children have a very special place in life which law should reflect. Legal theories and their phrasing in

---

[3] For example, the Court held in Coker v. Georgia, 433 U.S. 584 (1977) that death is an unconstitutionally excessive penalty for the crime of rape. Similarly, the Court decided in Enmund v. Florida, _____ U.S. _____, 73 L.Ed.2d 1140 (1982) that the imposition of the death penalty on a person who aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend to kill constitutes a violation of the Eighth and Fourteenth Amendments.

other cases readily lead to fallacious reasoning if uncritically transferred to determination of the State's duty towards children." Id at 536. And the Court noted in Bellotti v. Baird, 443 U.S. 662 (1979) that "our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults." Id at 635.

The determination by the Florida Courts that the Petitioner should in all respects be treated as an adult was not made upon the type of reasoned analysis envisioned by this Court in Kent v. United States, 383 U.S. 541 (1966). The Petitioner was not certified for treatment as an adult upon any evidentiary finding that he was capable of assuming the responsibility of an adult. On the contrary the decision to try the Petitioner as an adult was made automatically under the provisions of Fla. Stat. Ann. 39.02(5)(c)(1) which provides that every juvenile charged by indictment with a capital offense shall be tried in the adult courts.

The statute providing for an automatic transfer of a juvenile indicted for a capital offense has been upheld generally[4], but the Courts have never held that such an "automatic" divestiture of the child's right to be treated as a juvenile can also serve as a basis for the imposition of the death penalty. Certainly the argument for approving the applicability of the death penalty to juveniles would be much stronger (assuming it is a valid argument at all) in a case where all eight of the standards set forth in Kent, supra, have been proven in a hearing, and the juvenile has been determined upon evidence to bear the same degree of responsibility as an adult. That is not the case here, however.

---

[4] Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977) cert. den. 434 U.S. 1088.

The fact that juveniles are entitled to separate treatment in some instances has not only been recognized in the opinions of this Court but has been noted as well in the applicable Florida legislation and court decisions. The Florida Juvenile Justice Act itself recognizes that one of its purposes is:

> To assure to all children brought to the attention of the courts either as a result of their misconduct or because of neglect or mistreatment by those responsible for their care, the care, guidance, and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interest of the State. Fla. Stat. Ann. 39.001(2)(b)

Thus, the Florida Legislature has recognized that the emphasis in the treatment of juvenile offenders should be placed on the welfare of the child and not upon the traditional punitive considerations used in the disposition of an adult case.

The distinction between children and adults has been recognized in all of the capital cases presented to the Florida Supreme Court except this one. As Mr. Justice Boyd noted in his dissent: "[The Florida Supreme Court] has thus far vacated the death sentence of every defendant who has been under the age of eighteen. See Vasil v. State, 374 So.2d 465 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Thompson v. State, 328 So.2d 1 (Fla. 1976)". Mr. Justice Boyd did not advocate the absolute rule urged by the Petitioner in this case, but he did recognize that in view of "society's special concern for its juveniles, great significance should be attached to the fact that a person accused of a capital felony is a minor, especially a minor who was unemancipated. Magill slip at 8. (Appendix D)

Petitioner submits that the Court must make some uniform distinction in this area of the law. No one would seriously argue that a five year old should be put to death for committing an act however egregious it may have been. The imposition of the

death penalty certainly constitutes cruel and unusual punishment in that instance. Thus, the task of the Court is not to determine whether the death penalty can be constitutionally applied to a child, but rather to determine the age below which the death penalty cannot be applied consistently with the Constitution.

Petitioner respectfully submits that the line should be drawn at the age of eighteen. Since 1962 the American Law Institute's Model Penal Code has embodied a recommendation that the death penalty should not be imposed on youthful offenders below the age of eighteen.[5] Revisors of the Model Code have recently reaffirmed that considered judgment, despite suggestions that the minimum age should be reduced.[6]

The acceptance of the age of eighteen as the appropriate boundary between childhood and adulthood is uniformly established in both federal and state law. For example, the Twenty Sixth Amendment of the Constitution guarantees the right to vote to any citizen who has attained the age of eighteen years. With respect to criminal responsibility the Florida laws define a child "as any person under the age of eighteen years".[7] That age has been accepted by the Florida Legislature as the age of civil responsibility as well, for a child under the age of eighteen is legally incapable of handling his affairs.[8]

---

5 AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6 (1) (d) (Proposed Official Draft, 1962) reads:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of a first degree if it is satisfied that:
>
> (d) the defendant was under 18 years of age at the time of the commission of the crime.

6 AMERICAN LAW INSTITUTE, MODEL PENAL CODE, §210.6, Comment 133 (Official Draft and Revised Comments, 1980)

7 Fla. Stat. Ann. 39.01(7)

8 Fla. Stat. Ann. 743.07

It would defy reason to hold that a child under the age of eighteen is capable of assuming a sense of responsibility which is so great that it justifies the imposition of the death penalty when we have noted in other areas of the law that he does not yet have sufficient maturity[9] to make a contract or cast a vote in an election. The line has been drawn at the age of eighteen in many other areas of the law. There is no reason why it cannot be drawn there in the Court's most difficult task of locating the boundaries of our most severe criminal penalty.

For each of these reasons the Petitoner respectfully submits that the Court grant certiorari and give plenary consideration to the issue presented.

Two

THE EXCLUSION FOR CAUSE OF A JUROR WHO EXPRESSED A CONSCIENTIOUS OBJECTION TO THE IMPOSITION OF THE DEATH PENALTY UPON YOUTHFUL OFFENDERS DEPRIVED PETITIONER OF HIS SIXTH AND FOURTHEETH AMENDMENT RIGHTS

It is now well settled that a prospective juror in a capital case may not be excused for cause as a result of his general opposition to the death penalty. The decisions of this Court have made it clear that a juror may not be excused for cause in such a case because of his views on the death penalty unless those beliefs would interfere with his ability to follow the law applicable to the case. Witherspoon v. Illinois, 391 U.S. 510 (1968), Boulden v. Holman, 394 U.S. 478 (1969) and Maxwell v. Bishop, 398 U.S. 262 (19700. If only one venireman was improperly excused for cause because he voiced general objections

---

9 Under Florida law an even higher degree of chronological maturity is required to buy a drink in a bar. Fla. Stat. Ann. 562.111 (must be age nineteen to possess alcoholic beverages).

to the death penalty, the death sentence cannot be carried out. Davis v. Georgia, 429 U.S. 122 (1976).

Petitioner respectfully submits that the voir dire procedure used in his trial fails to meet the minimum Constitutional standard set by this Court for jury selection in capital cases. The prosecutor was not only permitted to obtain a "death inspired" jury, but he was allowed to narrow the panel down to those prospective jurors who were predisposed to reject the statutory mitigating circumstance relating to age.

The Trial Judge permitted the prosecutor to obtain a commitment from each juror that the Petitioner's youthful age would not affect he juror's ability to make a finding of guilt or recommend the imposition of the death penalty. This in itself is a violation of the Petitioner's Sixth and Fourteenth Amendment rights[10] as Witherspoon only allows for the exclusion of jurors who hold such rigid opposition to the death penalty that they could not follow the Court's instruction on the law.

Many of the jurors selected in this case assured the prosecutor that the mere fact that the Petitioner was under twenty one would not influenece their vote for or against the imposition of the death penalty. Tr-25,26,28,30,31 Juror Bonner conceded that the Defendant's age would influence her ability to recommend the death penalty Tr-35 and was ultimately excused for cause over the objection of defense counsel. Tr-37.

It was not explained to any of the jurors that the Petitioner's youthful age would have been a mitigating factor[11] under Fla. Stat. Ann. 921.141(6)(g) which they may have legitimately taken into consideration in arriving at their

---

[10] The questions were also improper under Fla. Stat. Ann. 913.13 which provides that jurors in captial cases shall be disqualified only if their views preclude them from finding a defendant guilty.

[11] Fla. Stat. Ann. 921.141(6)(g)

recommended disposition. The prosecutor's questions implied that it would be improper for the jurors to show mercy on the Petitioner because of his young age. Moreover, the exclusion of jurors who might have been affected by his youthfulness was tantamount to the exclusion of jurors for no more than an expression of their ability to follow the law which allows them to consider age as a mitigating circumstance.

This Court reasoned in Witherspoon that "a man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him...and can thus obey the oath he takes as a juror". Id at 519. It was upon that rationale that the Court concluded that by excluding all those who opposed capital punishment, the State "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die". Id at 520. Surely it cannot be said to be any less of a constitutional intrusion to exclude those who favor capital punishment generally but admit that a persons' age might affect he decision to impose the death penalty in a given case.

This Court recently held in Adams v. Texas 448 U.S. 38 (1980) that the Witherspoon doctrine is applicable to bifurcated capital trials. The Court held in that case that it was error of constitutional dimension to exclude jurors who are unable to take an oath that the mandatory penalty of death or imprisonment for life would not "affect [their] deliberations on any issue of fact". In this case, no less than in Adams, the exclusion of those who might be "affected" by Petitioner's age, requires a reversal of conviction.

It is quite true that Juror Bonner was ultimately forced to admit that her views would preclude her from returning a guilty verdict. However, this occurred only after the prosecutor was allowed to question her improperly. He asked her for her opinion about executing young people without explaining to her that it is perfectly proper under the Florida law to consider age as a

mitigating factor. Surely her answers under these circumstances cannot be taken as an expression of her inability to follow the law.

The procedure adopted in this case and approved by the Florida Supreme Court below, is clearly at odds with the principles set forth in Witherspoon and Adams, supra. The exclusion for cause of prospective jurors simply because they indicate that Petitioner's age might affect their recommendation as to the imposition of the death penalty constitutes a plain violation of the Sixth and Fourteenth Amendment.

## Three

THE EXCLUSION OF PETITIONER'S PENALTY PHASE TESTIMONY REGARDING HIS REMORSE FOR THE ACT CONSTITUTES AN IMPROPER RESTRICTION UPON THE PRESENTATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The penalty phase of the bifurcated trial proceedings focused upon an analysis of Petitioner's emotional and psychological problems. Although Petitioner testified, he was not permitted to explain to the jury how he felt about the commission of the offense. Nor was he allowed to make a general statement of his own to the jury as is indicated by the following portions of the record:

> **DEFENSE COUNSEL:** (Questioning Petitioner) How do you feel at this time, Paul, concerning the acts that you have done?
>
> **PROSECUTOR:** Objection, Your Honor. He's asking how he feels as to some act he's done, and that calls for a conclusion of the witness. How he feels is not pertinent to phase two of this proceeding.
>
> **THE COURT:** Objection sustained.
>
> **DEFENSE COUNSEL:** Do you have any statement

you would like to make at this time, Paul?

PROSECUTOR: Objection, Your Honor. Any statement--he should ask the witness a question, Your Honor.

THE COURT: Sustained. Tr. 566

The prosecutor's objection was sustained on the ground that Defense counsel's questions did not elicit any information which would be relevant to the statutory mitigating circumstances. The Trial Judge explained his ruling to the jury as follows:

> THE COURT: Sustained. Members of the jury, we'll complete this and hear arguments of counsel and the Court will read to you what factors you are to consider in aggravation and in mitigation and I'm sustaining the objections because they fall without purview of these factors set forth by the statute, by the legislature, which you should consider in mitigation. Therefore, the objection is sustained in this case. You understand that. Tr.-566,567.

There can be no question that the Trial Judge believed that the testimony presented during the penalty phase trial must be limited to the statutory mitigating circumstances. Therefore, his ruling is directly contrary to the principle of law set forth by this Court in Lockett v. Ohio, 438 U.S. 586 (1978).

In Lockett, the Court held that statutory restrictions upon relevant mitigating factors in capital cases are constitutionally impermissible. The Court noted that the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis of the sentence less than death." Id. at 604.

It can hardly be argued that the instant case meets the constitutional standard set forth by the Court in Lockett in view

of the fact that the Trial Judge refused to allow Petitioner to give "his own statement" to the jury in mitigation. The strict adherence to the admonition of this Court that the Defendant should be allowed to present any aspect of his character or record and any of the circumstances of the offense that he proffers requires a reversal of the conviction below. The Trial Judge was not at liberty to exclude from the jury the Defendant's personal statement about the commission of the crimes before he heard it. At the very least, it is clear that the objection was not within the "purview" of the statutory mitigating circumstances.

The Florida Supreme Court held, without acknowledging Lockett,[12] that an expression of remorse by one facing the death penalty "may or may not be relevant". Magill at 386 So.2d 1190 (Appendix A). The Court concluded that it was harmless error in any event as "the record shows many instances where [Petitioner] was allowed to bring out remorse as a mitigating factor". Id. at 1190.

The Court did not refer to any such "instances" in the record which would have demonstrated that the error was indeed harmless. Unless the violation of the rule in Lockett can be shown to be harmless the sentence of death must be vacated. As the Court noted, the risk of excluding possibly relevant evidence is that "the death penalty will be imposed in spite of factors which may call for a less severe penalty". Lockett at 438 U.S. 605.

For each of the foregoing reasons, Petitioner respectfully submits that the Trial Court improperly restricted the testimony in mitigation he proffered during the penalty phase trial. The

---

[12] The Lockett decision was published on July 3, 1978, more than two years before the initial decision of the Florida Supreme Court.

exclusion of this evidence, approved by the Florida Supreme Court, constitutes a violation of Petitioner's Eighth and Fourteenth Amendment rights.

Four

THE AFFIRMANCE BY THE FLORIDA SUPREME COURT OF THE TRIAL COURT'S FINDINGS AS TO THE AGGRAVATING CIRCUMSTANCES PRIOR TO THE REMAND TO THE TRIAL COURT FOR A NEW SENTENCING HEARING VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The Supreme Court originally vacated the sentence of death because the Trial Judge failed to render a specific analysis of the applicable mitigating circumstances. Magill 386 So.2d at 1191. Nevertheless, the Court approved the applicability of the aggravating circumstances found by the Trial Judge. This prejudgment by the Court prior to the resentencing hearing constitutes a violation of Petitioner's Eighth and Fourteenth Amendment rights.

Although it was unnecessary to do so, the Court approved of the Trial Court's finding that the homicide was especially heinous, atrocious and cruel[13] as well as the Trial Court's finding that the Defendant killed his victim to avoid identification.[14] The State Appellate Court concluded that "it is apparent that the Trial Judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified" 386 So.2d at 1191.

The untimely expression of the Court's opinion clearly deprived Petitioner of his right to a fair and impartial sentencing hearing. Likewise, it deprived him of his right to a fair and impartial appeal to the Florida Supreme Court following

---

13 Fla. Stat. Ann. 921.141(5)(h)

14 Fla. Stat. Ann. 921.141(5)(e)

resentencing. The Supreme Court had already approved of critical findings of aggravation before they were made by the Trial Judge at the new sentencing hearing.

One of the primary reasons for upholding the Florida death penalty statute, was that it provided a guaranteed direct review of the sentence by the Florida Supreme Court. This Court in Proffitt v. Florida, 428 U.S. 242 (1976), said:

> "...Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of defendants. The Supreme Court of Florida reviews each death sentence to insure that similar results are reached in similar cases," Id at 258.
>
> "...is apparent that the Florida Court has undertaken responsibility to perform its function of death sentence review with a maximum of rationality and consistency..."Id at 259.
>
> "...any suggestion that the Florida Court engages in only cursory or rubber stamp review of death penalty cases is totally controverted by the fact that it has vacated over one third of the death sentences that have come before it." Id at 259.

The "rationality and consistency" of review which apparently impressed this Court in Proffitt was totally lacking in this case. Surely this Court did not intend to approve of a procedure whereby the death penalty would be imposed by some piecemeal method of reviewing the applicable factors.

Meaningful appellate review of the sentence itself is a necessary element of the constitutionality of the Florida capital penalty statute. The review can hardly be characterized as meaningful if, in a case such as this one, where the Supreme Court has announced in advance that it will approve certain findings the Trial Court may make on remand.

Petitioner respectfully submits that the Court should grant certiorari to correct the unconstitutional application of Fla. Stat. Ann. 921.141 by the Florida Supreme Court.

## Five

THE FLORIDA SUPREME COURT IN AFFIRMING THE IMPOSITION OF THE DEATH PENALTY IN THE PRESENT CASE HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDEMENTS.

Petitioner's argument on this point is divided into two parts. The first part contains the argument that the "especially heinous, atrocious and cruel" aggravating circumstance set forth in Fla. Stat. Ann. 921.141 (5) (h) should not have been applied under the facts. In the second part the Petitioner contends that the various and diverse interpretations placed upon the term "especially heinous, atrocious and cruel" by the Florida Supreme Court in the seven years since Proffitt v. Florida, supra, have rendered the term vague and overbroad.

Consideration of the first argument must begin with the Florida Supreme Court's original defintion of the term "especially heinous, atrocious and cruel." The phrase was intially defined in State v. Dixon, 283 So.2d 1 (Fla. 1973) as follows:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim."

The kinds of acts which set a murder apart, and make it heinous, atrocious and cruel vary significantly from case to

case. However, the Florida Supreme Court has held that an ordinary murder by shooting is not, as a matter of law, heinous, atrocious and cruel. Lewis v. State, 398 So.2d 432 (Fla. 1981). The fact that a murder was cold, calculated, or senseless does not cause it to rise to the level of being especially heinous, atrocious and cruel. Williams v. State, 386 So.2d 538 (Fla. 1980).

The application of subsection (5)(h) should be limited to situations wherein the victim has suffered extensively from the intentional acts of the defendant. For example, in Thompson v. State, 389 So.2d 197 (Fla. 1980) the defendant kidnapped, raped and tortured the victim for hours until she died of shock and loss of blood. In King v. State, 390 So.2d 315 (Fla. 1980) the victim's body was found with burns, bruises, brain hemorrhage, stab wounds, a broken neck, and her vagina had been torn with knitting needles. The facts in Rutledge v. State, 374 So.2d 975 (Fla. 1979) were even more appalling. In that case, the State had a twenty-three minute tape recording of the victims, a mother and three children, screaming and begging for mercy while the defendant butchered them and taunted them with vile language.

The acts of the Petitioner in this case simply do not warrant the application of subsection (5)(h) in light of the definition of that section in Dixon supra. The Trial Court found that this murder was especially heinous, atrocious and cruel because there was no logical or compelling reason for the [Petitioner] to kill the victim. Tr-14. This finding can hardly be said to show that the murder was set apart from the norm when in fact, it is questionable whether any first degree murder could be called logical or compelling.

A review of the evidence demonstrates that nothing took place which justifies a view that this murder was so heinous that it should be set apart from any other premeditated murder. Here, as in Godfrey v. Georgia, 446 U.S. 420 (1980) there is "no

principaled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433.

The evidence of the events which took place during the commission of the murder came mainly from the Petitioner's statement. He said that as he was walking back to the car with the girl he shot her three times. The first shot was in the head, after which she "kind of grunted a little" and fell to the ground. Tr-352. He then shot her in the chest and once again in the head. Tr-352,353.

The medical examiner's testimony would not support a theory that the victim died a lingering death or that she was tortured. Tr-378. The victim's body was found very soon after the shooting, so soon in fact that a cigarette presumably left by the Petitioner was still smoldering in the vicinity of the body. Tr-321. This, along with the fact that the victim never cried out or indicated that she knew what was happening shows that she died quickly and painlessly of gunshot wounds.

The fact that the acts of the Petitioner do not warrant the application of subsection (5)(h) is further supported by the decision of the Florida Supreme Court in Lewis v. State, 377 So.2d 640 (Fla. 1980). In that case, the Defendant shot the victim once in the chest and several more times in the back as she was attempting to escape. In Lewis the victim must have known what was happening to her, and she must have felt the pain of the shots. However, the Court held that the murder was not especially heinous. Surely, if the killing in Lewis did not warrant application of subsection (5)(h) the killing in this case could not.

The Florida Supreme Court cited Alvord v. State, 322 So.2d 533 (Fla. 1975) in support of its finding that the murder in the instant case was especially heinous, atrocious and cruel. In Alvord, three victims, a grandmother, mother and daughter, were

tied up and strangled with a cord, one by one. Certainly, a finding that the murder was heinous, atrocious and cruel was reasonable. However, that case should not be compared to this one.

The Florida Supreme Court has stated that the law must be unemotionally applied to the facts even though all senseless killings are appalling. Fleming v. State, 374 So.2d 954 (Fla. 1979). The facts of this case do not warrant a finding that this murder was especially heinous, atrocious and cruel. Therefore, the Florida Supreme Court committed constitutional error in approving of the application of Fla. Stat. Ann. 921.141 (5)(h).

The second branch of the argument, i.e. that the Florida Supreme Court has rendered the term "especially heinous, atrocious and cruel" vague and overbroad by the various and diverse constructions placed upon it in the seven years since Proffitt presents a problem which is deserving of this Court's attention. A resolution of the constitutional issue by this Court would not only have significance to the individual fate of the Petitioner but it would have a broad impact upon a widespread constitutional deficiency in the administration of the death penalty in Florida.

Before this Court decided Proffitt v. Florida, supra. the Florida Supreme Court placed a narrow construction upon the term "especially heinous, atrocius and cruel" and was extremely selective in its application. The Court rejected the application of the aggravating circumstance even in cases which seemed to contain the elements of the definitions stated in Dixon v. State,supra.. For example, in Swan v. State, 322 So.2d 485 (Fla. 1975) where the defendant entered the victim's home, beat her, bruising her body severely, and tied her up with bed sheets in such a way that death would result from choking or strangulation, all of which ultimately did cause her death, the Court held that the aggravating circumstance was not proven. Similarly, the

Court rejected the aggravating circumstance in Halliwell v. State, 323 So.2d 557 (Fla. 1975) where the defendant beat the victim with a nineteen inch breaker bar until he sustained fatal injuries to the brain and then mutilated his body by dismembering it with a saw and a fishing knife.

The State Court decisions in the intervening years since Proffitt, however, clearly indicate that the defintion has been expanded. For example, in Gibson v. State, 351 So.2d 948 (Fla. 1977) where the only evidence pertaining to the death was that the defendant shot the victim three times the Court held that the aggravating circumstance applied. Likewise, in Harvard v. State, 375 So.2d 833 (Fla. 1978) a death caused instantly by a single shotgun blast to the neck was characterized as "especially heinous, atrocius and cruel".

Part of the original definition of "especially ehinous, atrocious and cruel" contained in State v. Dixon, supra. was: that conduct which is "unnecessarily torturous to the victim." Now it appears from the decisions of the Florida Supreme Court that a murder can be "heinous" if the killing itself was not necessary. See Hargrave v. State, 366 So.2d 1 (Fla. 1978) and Ford v. State, 374 So.2d 496 (Fla. 1979). Thus, it apears that the Court has substituted the lack of justification for the offense, an element which would appear to exist in any murder case resulting in a conviction, for the requirement that death be inflicted in such a manner that it is cruel to the victim.

Another aspect of the Florida Supreme Court's post-Proffitt construction of subsectin (5)(h) is the tendency on the part of the Court to find the existence of the aggravating circumstarce on facts which are necessary to prove the offense. This type of duplication clearly occurred in Raulerson v. State, 358 So.2d 826 (Fla. 1978) where the Court found that the homicide was particularly heinous, atrocious and cruel because it was committed in a "cold and calculated fashion". It is difficult

indeed to detemine what that language adds to the premeditation required to prove the murder in the first instance.

An examination of all of the post-Proffitt Florida Supreme Court decisions reveals that there is absolutely no discernable pattern to the manner in which the subsection (5)(h) aggravating circumstance is applied. Even the cases which appear to raise identical questions are disposed of inconsistently with each other. In Riley v. State, 366 So.2d 19 (Fla. 1978) the Court rejected a subsection (5)(h) finding by the lower court in a case where the defendant shot the victim's son who was apparently left to watch his father die, on the ground that it can only apply to acts committed against the victim of the homicide. However, in Gibson v. State, supra, the court held that the murder of the victim was especially heinous, atrocious and cruel because the defendant had also shot another person who was left lying in the gutter.

The attempt to reconcile these decisions demonstrates the truth of the criticism of subsection (5)(h) that it could be applied to any case. State v. Dixon, 283 So.2d 1 (1973), Ervin J. Dissenting. at 18. It also proves that Mr. Justice England was right when he said that the Florida Death Penalty Statute "fosters rather than avoids the proscribed unbridled discretion." Alvord v. State, 322 So.2d 533 (Fla. 1975) at 541.

The argument that subsection (5)(h) has been used as a"catch all" aggravating circumstance to cover a multitude of situations is demonstrated most effectively by an examination of the frequency with which it has been used. Since Proffitt there have been one hundred and twenty five murder caes wherein the Florida Supreme Court actually reached a sentencing decision. Of the one hundred and twenty five cases cases, eighty nine affirmed the death penalty and thirty six reduced it to life. In only fifteen of the eighty nine cases affirming the imposition of the death penalty has the court imposed the death penalty without a finding

that the crime was "heinous, atrocious and cruel".[15]

The fact that subsection (5)(h) is only one of nine aggravating factors and it appears to have been used to support approximately eighty seven percent of the death sentences affirmed by the Florida Supreme Court, should be no less than alarming. The aggravating circumstance in question was designed to represent the exception and not the rule. As Mr. Justice White noted in Furman v. Georgia, 408 U.S. 238 (1972) a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not". Id. at 313. Although the Florida Supreme Court said in Lewis v. State, 377 So.2d 640 (Fla. 1979) that the aggravating circumstance under review should only be used in cases wherein the murder is especially heinous, the facts demonstrate that is has been used in an overwhelming percentage of the cases.

The final constitutional deficiency in the application of subsection (5)(h) is found in the Florida Court's failure to explain, in many cases, why the circumstances applies or does not apply. In Holmes v. State, 374 so.2d 944 (Fla. 1979) the Trial Court failed to explain the reason for its subsection (5)(h) finding. The Florida Supreme Court affirmed the judgment without giving its own analysis of the application and held that a finding in support of the death penalty need not be made according to any prescribed form. Likewise in Brown v. State,

---

15 Sawyer v. State, 313 So.2d 680 (Fla. 1975), Meeks v. State, 339 So.2d 186 (Fla. 1976), Cooper v. State, 336 So.2d 1133 (Fla. 1976), Songer v. State, 322 So.2d 481 (Fla. 1975), Jackson v. State, 359 So.2d 1190 (Fla. 1978), Demps v. State, 395 So.2d 501 (Fla. 1981), Shriner v. State, 386 So.2d 525 (Fla. 1980), Enmund v. State, 399 So.2d 1362 (Fla. 1981) rev'd 102 S.Ct. 3368, (1982), Armstrong v. State, 399 So.2d 953 (Fla. 1981), Zeigler v. State, 402 So.2d 365 (Fla. 1981), Tafero v. State, 402 So.2d 355 (Fla. 1981), Riley v. State, 413 So.2d 1173 (Fla. 1982), Antone v. State, 382 So.2d 1205 (Fla. 1980), Daugherty v. State, So.2d ___ 7 F.L.W. 438 (Fla. 1982), and Middleton v. State, So.2d ___ 8 F.L.W. 9 (Fla. 1982).

381 so.2d 690 (Fla. 1980) the Court affirmed a finding that the murder was "especially heinous, atrocius and cruel" without explaining its reason for doing so. Ironically, the Court in Brown made the following observation in affirming its finding that the aggravating circumstance applied:

> Given the imprecision of the criteria set forth on our capital punishment statute, we must test for reasoned judgment in the sentencing process rather than mechanical tabulation to arrive at a net sum.
> Id at 696.

The refusal to explain the reason for applying or not applying an aggravating circumstance on the ground that the law is "imprecise" and therefore the court should make a "reasoned judgment" only serves to perpetuate the constitutional deficiency identified if Furman v. Georgia, supra.

For each of the foregoing reasons, the Petitioner respectfully submits that the Florida Supreme Court, in affirming the imposition of the sentence of death in the present case has adopted such a broad and vague construction of the term "especially heinous, atrocious and cruel" as to violate his rights under the Eighth and Fourteenth Amendments.

## Six

**THE FLORIDA SUPREME COURT ERRED INAPPROVING OF THE USE OF THREE SEPARATE AGGRAVATING CIRCUMSTANCES ALL OF WHICH WERE PROVEN BY THE SAME EVIDENCE.**

The Trial Judge found a total of four aggravating circumstances, three of which Petitioner contends were based upon the same evidence. Specifically the Court found:

> 1. That three felonies, namely, Murder in the First Degree, Involuntary Sexual Battery and used ot threatened to use in the process

> thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant, Paul Edward Magill.
>
> 2. The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape.
>
> 3. The said capital felony was especially heinous, atrocious and cruel as there existed no logical or compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind.
>
> 4. The said capial felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain.
>
> (Appendix C)

The first finding makes no grammatical sense but one would have to assume it had something to do with the Trial Judge's decision to sentence Petitioner to death for it is contained in the formal findings used to support that decision. The Trial Judge was probably attempting to apply Fla. Stat. Ann 921.141 (5)(b) relating to previous convictions of a felony involving violence, inasmuch as the Petitioner was convicted of rape and robbery simultaneously with his conviction for murder.

The finding in question obviously constitutes an attempt to state some form of aggravation. It could not have been intended as a mere recitation of the crimes for which the Petitioner was convicted for the Judge had already done that in the portion of the text of the order preceding the numbered findings. (Appendix C). If it was not part of the justifcation for imposing the death penalty, then it should not have been placed in the written "findings" prepared for that purpose.

The second finding is merely a duplication of the first as the Court had already taken into consideration that the crime occurred in the commission of a rape and robbery. Thus, the contemporaneous offense of rape and robbery were used to support two separate aggravating circumstances. (Findings 1 and 2).

Though the Petitioner has maintained that the third aggravating circumstance cannot be applied for the reasons set forth in the preceding argument it was indeed a separate factor. Petitioner does not contend that the third finding was duplicated by any of the others.

The fourth finding, i.e. that the capital felony was committed in "connection with the crime of robbery which was perpetrated for pecuniary gain" adds nothing. The contemporaneous offense of robbery had already been used as an aggravating circumstance in Finding 1 and again in Finding 2. The fact that it was a robbery for "pecuniary gain" is meaningless. All robberies are committed for pecuniary gain.

In conclusion, it is clear that the Florida Supreme Court approved three separate aggravating circumstances (Findings 1,2, and 4) all of which were essentially the same. If the Trial Judge had viewed these three findings as one (as he should have) he may not have concluded that the aggravating circumstances "outweighed" the mitigating circumstances.

## Seven

THE EXECUTION OF THE PETITIONER WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIEW OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN THIS CASE.

At the close of the resentencing hearing, the Trial Judge found the existence of the following three mitigating circumstances:

> a). the evidence shows that defendant Magill was 17 years of age at the time of the offense charged;
>
> b) that the defendant Magill had no significant prior criminal record;
>
> c) the defendant's father passed away on December 28, 1975.

Petitioner submits that these three factors outweigh the aggravating circumstances and that the Florida Supreme Court was therefore in error in affirming the sentence of death. The mitigating circumstances are far more compelling than the aggravating circumstances.

The Petitioner's young age should have been sufficient standing alone to persuade the Florida Supreme Court to reverse the sentence of death. In Gregg v. Georgia, this Court singled out an offender's youth as among the factors which might most "mitigate against imposing capital punishment" 428 U.S. at 197.

The Petitioner was not only a young man but he was a young man with no prior criminal record. The Florida Supreme Court was not asked to reverse the death sentence of a ruthless career criminal or a repeat offender who had been given chance after chance. Rather, the Court was asked to reverse the sentence of a seventeen year old first offender

Finally, we submit that the Trial Court's finding of the non-statutory mitigating circumstance relating to the emotional condition resulting from the death of the Petitioner's father is amply supported by the evidence. Testimony was presented that the Petitioner had been under psychiatric or psychological treatment continuously from the age of thirteen until the occurrence of the offense. S-4-6.

If the death penalty is to be applied at all, it should certainly not be applied in the presence of mitigating circumstances such as these.

## CONCLUSION

The Petition for Writ of Certiorari to the Florida Supreme Court should be granted.

PHILIP J. PADOVANO
1020 E. Lafayette St., Suite 201
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

IN AND FOR MARION COUNTY.
CRIMINAL ACTION

STATE OF FLORIDA :

vs. :

Case No. 77-19

PAUL EDWARD MAGILL, :

Coit-222

Defendant. :

.. .. .. .. .. .. .. .. .. .. :

## JUDGMENT AND SENTENCE

The above named Defendant, PAUL EDWARD MAGILL, with his counsel, Robert E. Pierce and Hale R. Stancil, heretofore entered his plea of Not Guilty to the charges of (1) unlawfully, with premeditated design, causing the death of KAREN SUE YOUNG, by killing and murdering her while engaged in the perpetration of a crime, by shooting her with a firearm, to-wit, a .44 magnum revolver, in violation of Florida Statutes 782.04; (2) committing an unlawful sexual battery upon one KAREN SUE YOUNG, and in the process thereof used or threatened to use a deadly weapon, to-wit, a .44 magnum revolver, in violation of Florida Statutes 794.011(3); and, (3) the crime of robbery by force, violence, or assault, or putting in fear, said property belonging to Braxton Jones, Inc., doing business as Jiffy Food Store #2500, and in the course of said robbery carried a firearm, to-wit, a .44 magnum revolver, in violation of Florida Statutes 812.13; and thereupon said Defendant was duly tried by a Jury, with his attorneys representing him at such trial; and the Jury having brought in its Verdict finding the Defendant guilty of all of the above offenses; and said Jury, after having heard additional evidence, rendered its Advisory Sentence recommending death in connection with the crime of Murder of the First Degree; and the Court having adjudicated said Defendant guilty of said offenses and filed its Findings of Fact herein; and the Defendant being asked by the Court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence, it is, therefore,

-A-

Open Court
day of April, 1977
E. THIGPIN
Muriel Hopper D.C.

CERTIFIED: A TRUE COPY
FRANCES E. THIGPIN, CLERK
BY Muriel Hopper D.C.

CO18.223

THE JUDGMENT, ORDER AND SENTENCE of the Court as to the offense of First Degree Murder that the Defendant, PAUL EDWARD MAGILL, be electrocuted until dead as directed by the laws of the State of Florida.

DONE AND ORDERED in open court at Ocala, Marion County, Florida, this 25 day of April, 1977.

WILLIAM T. SWIGERT, Circuit Judge

ed in Open Court
25 day of April, 1977
FRANCES E. THIGPIN
Deputy Clerk

CERTIFIED A TRUE COPY
FRANCES E. THIGPIN, CLERK
BY _____ D.C.

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY.
CRIMINAL ACTION

STATE OF FLORIDA :

vs. :

PAUL EDWARD MAGILL, :

Defendant. :

.. .. .. .. .. .. .. .. .. .. .:

Case No. 77-19

C018-225

## FINDINGS OF FACT

THIS CAUSE coming on this day to be considered pursuant to the provisions of Florida Statutes 921.141, after (1) the conviction of the Defendant, PAUL EDWARD MAGILL, of unlawfully, with premeditated design, causing the death of KAREN SUE YOUNG, by killing and murdering her while engaged in the perpetration of a crime, by shooting her with a firearm, to-wit, a .44 magnum revolver, in violation of Florida Statutes 782.04; (2) the conviction of said Defendant of committing an unlawful sexual battery upon one KAREN SUE YOUNG, and in the process thereof using or threatening to use a deadly weapon, to-wit, a .44 magnum revolver, in violation of Florida Statutes 794.011(3); and (3) the conviction of said Defendant of the crime of robbery by force, violence, or assault, or putting in fear, said property belonging to Braxton Jones, Inc., doing business as Jiffy Food Store #2500, and in the course of said robbery carrying a firearm, to-wit, a .44 magnum revolver, in violation of Florida Statutes 812.13.

In connection with the above, the Court is in receipt of a Pre-sentence Investigative Report on said Defendant and a copy of same, including all portions thereof, and for emphasis it is stated that the confidential portion thereof is included by this reference, has been furnished to the State of Florida and to the Defendant and to his Attorney, and the Court being in receipt of the Advisory Sentence by the twelve person Jury as provided for in Florida Statutes 921.141, which advisory report found: (a) That sufficient aggravating circumstances exist in the above case of First Degree Murder to warrant the imposition of the sentence of death, and (b) that there were insufficient mitigating circumstances to outweigh the aggravating

d in Open Court
25 day of Apr., 1977

circumstances and, therefore, the Jury recommended a sentence of death on said Defendant, and after studying, considering and weighing all of the above the Court finds and makes and sets forth the following findings of fact:

1. That three felonies, namely, Murder in the First Degree, Involuntary Sexual Battery and used or threatened to use in the process thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant, PAUL EDWARD MAGILL.

2. The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape.

3. The said capital felony was especially heinous, atrocious and cruel, as there existed no logical or compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind.

4. The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain.

5. The Court finds no mitigating circumstances which outweigh the aforementioned aggravating circumstances.

6. The Jury who heard said trial also heard all the facts and circumstances concerning aggravating and mitigating circumstances and after hearing same and after argument of counsel and instructions by the Court, rendered an Advisory Sentence recommending death as the penalty for the commission of the said Murder.

Based upon the above facts, findings and circumstances, and the other matters as reflected in the record and the pre-sentence investigation, the Court hereby concludes that the advisory sentence of the Jury should be followed and that the death sentence should be imposed upon said Defendant.

Dated, this 25 day of April, 1977.

WILLIAM T. SWIGERT, Circuit Judge

ed in Open Court
d.y of_____, 19__

Paul Edward MAGILL, Appellant,

v.

STATE of Florida, Appellee.

No. 51699.

Supreme Court of Florida.

May 8, 1980.

As Revised On Denial of Rehearing Sept. 8, 1980.

Defendant was convicted in the Circuit Court, Marion County, William T. Swigart, Sr., J., of murder in the first degree and was sentenced to death. Defendant appealed. The Supreme Court, Adkins, J., held that: (1) denial of a continuance to allow defendant to take the deposition of an examining psychiatrist was not an abuse of discretion; (2) a juror who would not vote for a conviction of first degree murder because of her objection to applying the death penalty to a defendant under the age of 21 years was properly excused for cause; (3) the prosecutor was properly allowed to cross-examine defendant during the sentencing phase as to defendant's thinking and acting out what occurred beyond the robbery; and (4) the trial judge was required to articulate mitigating circumstances considered by him.

Affirmed in part, vacated in part, and remanded.

England, C. J., concurred in the affirmance of conviction, but incurred as to the vacation of the sentence in result only.

1. Criminal Law ⇐586, 1151

Application for continuance is addressed to sound judicial discretion of trial court and denial of such motion should not be reversed by appellate court unless there has been palpable abuse of this judicial discretion, which appears clearly and affirmatively in record.

2. Criminal Law ⇐594(1)

In prosecution for first degree murder, denial of continuance to allow defendant to depose examining psychiatrist was not abuse of discretion.

3. Criminal Law ⇐736(1)

In prosecution for first degree murder, any misstatement by state attorney concerning function and duties of jury was cured by appropriate instructions from trial court.

4. Criminal Law ⇐1166.16

In first degree murder prosecution, unreported bench conferences held during voir dire examination of jury did not constitute reversible error.

5. Jury ⇐188

In first degree murder prosecution, prospective juror, who would not vote for conviction of first degree murder, regardless of evidence, because of her objection to applying death penalty to defendant on basis of his age, was properly excused for cause.

6. Witnesses ⇐277(4)

In sentencing phase of first degree murder prosecution, prosecutor was properly allowed to cross-examine defendant regarding his thoughts and actions during murder where defendant had testified as to his mental state before murder.

7. Criminal Law ⇐1178(2)

In sentencing phase of prosecution for first degree murder, trial court's refusal to allow defendant to answer question as to whether he felt remorse for crime was not reversibly erroneous where defendant was allowed to bring out remorse as mitigating factor in many other instances.

8. Criminal Law ⇐986(3)

Before imposing death sentence, trial judge was required to articulate any mitigating circumstances considered by him.

---

Michael J. Minerva, Public Defender, and Margaret Good, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., Michael H. Davidson, Charles A. Stampelos and Raymond L. Marky, Asst. Attys. Gen., Tallahassee, for appellee.

-B-

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

The defendant, Magill, seventeen years of age at the time, robbed a small store, abducted the female attendant, raped her, and then killed her. An indictment was returned on January 6, 1977, and defendant was arraigned on January 17, 1977, at which time the public defender was appointed to represent the defendant. On February 1, 1977, the court ordered an examination of defendant to determine his competency to stand trial. On March 4, 1977, the defendant filed a motion for continuance on the ground that he had not yet received the reports of the appointed psychiatrists. The reports of the psychiatrists were filed on March 8 and March 14. The defendant filed a notice of intent to rely upon the defense of insanity on March 16; on the same day he filed another motion for continuance on the ground that he had been unable to take the deposition of the examining psychiatrists. The trial began on March 21, 1977.

Defendant says the trial court committed reversible error in denying the motions for continuance. The psychiatric evaluations were performed to determine defendant's competency to stand trial. These reports conclude the defendant was competent to stand trial and was sane at the time of the commission of the offense. The testimony of the psychiatrists would be inadmissible on the issue of guilt. In *Campbell v. State*, 227 So.2d 873 (Fla.1969), we held that the proffered testimony of a psychiatrist that the defendant, though able to distinguish between right and wrong, had a mental deficiency, and might not be able to conform his acts to the requirements of law, was not relevant to the question of whether or not the defendant was legally insane under the *McNaghten* test. Such testimony was, therefore, inadmissible.

[1, 2] In criminal cases an application for a continuance is addressed to the sound judicial discretion of the trial court, and the denial of such a motion should not be reversed by an appellate court unless there has been a palpable abuse of this judicial discretion. This abuse of discretion must clearly and affirmatively appear in the record. *Pittman v. State*, 51 Fla. 94, 41 So. 385 (1906). There has been no showing of palpable abuse of discretion and we therefore refuse to say the trial court committed error.

[3] Defendant next contends that during voir dire examination, the state attorney gave an erroneous explanation of the function and duties of the jury. This contention is without merit. The trial court instructed the jury as to their duties and functions, and these instructions were correct. Any misstatement by the state attorney during the voir dire examination was cured by appropriate instructions from the court.

[4] During voir dire examination of the jury several unreported bench conferences were held. We do not approve unreported bench conferences, but under the record of this case, the defendant has failed to show reversible error.

[5] Defendant says that the trial court committed error in excusing Juror Bonner for cause. In support of this contention defendant cites *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), where the principle is established that a prospective juror cannot be excused for cause in a capital case simply because the juror is opposed to the death penalty. However, *Witherspoon* also says the court may exclude a veniremen whose objections to the death penalty interfere with his or her ability to follow the law in the case.

The record discloses that Juror Bonner would not vote for a conviction of first degree murder, regardless of the evidence, because of her objection to applying the death penalty to a defendant on the basis of age. It was apparent from the examination that she would be unable to follow the law because of her bias or prejudice towards inflicting the death penalty upon those under the age of twenty-one years. As Juror

Bonner was properly excused, this contention of the defendant is also without merit.

[6] During the sentencing phase of the proceedings, the defendant's attorney attempted to limit the scope of direct examination of the defendant to a time frame prior to the robbery so as to show his understanding of emotional conflicts and reasons for the robbery. Defendant says that, over repeated objections, the prosecutor was permitted to cross-examine him on his thinking and acting out what occurred beyond the robbery. Actually the prosecutor attempted to stress the aggravating circumstances during his cross-examination of defendant in the sentencing phase. In *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973), we said:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla.Const., art. I, § 9, F.S.A., and U.S.Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

The defendant raised the matter of "Paul's emotional turmoil and problems" for consideration as a mitigating circumstance. Defendant claims that the exposition of that topic was strictly limited to his mental state prior to the robbery and that, therefore, the state exceeded the proper bounds of cross-examination when the state explored defendant's mental state in regard to the rape and murder of the victim. If the defendant opens the door as to his mental state prior to and during the commission of a crime, the state, during the sentencing procedure, is free to explore that area on cross-examination. Such cross-examination may be geared toward the mental attitude of defendant for a reasonable time after the commission of the crime.

[7] Defendant complains because he was not allowed to answer the question, "How do you feel at this time, Paul, concerning the acts that you have done?" The state of mind of a murderer during or immediately after the commission of the crime may be legitimately examined for remorse. His state of mind three or four months later, when facing the death penalty, may or may not be relevant. In any event, the record shows many instances where defendant was allowed to bring out remorse as a mitigating factor. The error if any, in not allowing defendant to once again express remorse is harmless.

[8] We next consider the propriety of the death sentence. The record clearly shows that defendant first robbed the victim and kidnapped her while in the process of fleeing the site of the robbery. He then took the victim to a wooded area and raped her. As they were returning to the car after the rape, the victim begged that she not be injured. Defendant realized that she would be able to identify him, so he shot her three times, "twice in the head and once in the chest." Defendant reaffirmed the details of a confession while on the stand at trial, although he attempted to recant the portion of his confession where he stated that he had killed the victim to avoid identification. The jury obviously believed the confession and not the recantation. This is well within their province. *Alvord v. State*, 322 So.2d 533 (Fla.1975); *Ford v. State*, 251 So.2d 862 (Fla.3d DCA 1971); *Wilson v. State*, 233 So.2d 479 (Fla.3d DCA 1969). The record shows that the victim was shot in the head and fell to the ground, after which defendant deliberately shot her twice more, once in the head and once in the chest. The chest shot was at such close range that it left powder burns. The record is clear that defendant had a cold, calculated design to effect the death of the helpless victim. This is evident from the

number of times defendant shot the victim with his .44 caliber pistol, the proximity of the muzzle of the pistol to the victim's chest, and defendant's statement to the police that he shot her to avoid identification and made sure that she was dead.

In *Meeks v. State*, 339 So.2d 186 (Fla. 1976), the victim was killed to avoid identification. Meeks was only twenty-one years of age, Magill was nearly eighteen. Meeks robbed a convenience store immediately preceding the murder. Magill robbed a convenience store and raped the victim preceding the murder. The only significant factual difference between *Meeks* and the case before us is that in *Meeks* the defendant did not rape his victim before he murdered her. The death penalty was awarded in *Meeks*.

Defendant's reliance upon *Halliwell v. State*, 323 So.2d 557 (Fla.1975), is not well placed. The defendant in *Halliwell* was involved in a love triangle which culminated in defendant's beating the husband to death after the husband had beat the wife. The motive was certainly different.

It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified. The Court found that there were "no mitigating circumstances which outweigh the aforementioned aggravating circumstances." However, the court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death. As stated in *State v. Dixon*, 283 So.2d at 8:

> The fourth step required by Fla.Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

A most important safeguard is the propounding of aggravating and mitigating circumstances, which are determinative of the sentence imposed. Under the circumstances, it is necessary for us to set aside the sentence of death and remand the case to the trial judge for the purpose of making proper findings of fact and then, imposing an appropriate sentence. It is, of course, unnecessary to impanel another jury.

The judgment of conviction is affirmed. The sentence of death is vacated and the cause remanded to the trial judge for further proceedings consistent with this opinion.

It is so ordered.

BOYD, OVERTON and ALDERMAN, JJ., concur.

ENGLAND, C. J., concurs fully in the affirmation of Magill's conviction but in result only as to the vacation of Magill's sentence.

Frank Anthony ROSS, Appellant,

v.

STATE of Florida, Appellee.

No. 52929.

Supreme Court of Florida.

June 12, 1980.

Rehearing Denied Sept. 12, 1980.

Defendant was convicted before the Circuit Court, Highlands County, Clifton M.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MARION COUNTY

CASE NO: 77-19

STATE OF FLORIDA

vs

C032-261

PAUL EDWARD MAGILL

Defendant.

---

JUDGMENT AND SENTENCE

The above named Defendant, PAUL EDWARD MAGILL, with his counsel, heretofore entered his plea of Not Guilty to the charges of (1) unlawfully, with premeditated design, causing the death of KAREN SUE YOUNG, by killing and murdering her while engaged in the perpetration of a crime, by shooting her with a firearm, to wit: a .44 magnum revolver, in violation of Florida Statutes 782.04; (2) committing an unlawful sexual battery upon one KAREN SUE YOUNG, and in the process thereof used or threatened to use a deadly weapon, to wit: a .44 magnum revolver, in violation of Florida Statutes 794.011(3) and (3) the crime of robbery by force, violence, or assault or putting in fear, said property belonging to Braxton Jones, Inc., doing business as Jiffy Food Store #2500, and in the course of said robbery, carried a firearm, to wit: a .44 magnum revolver, in violation of Florida Statute 812.13; and thereupon said Defendant was duly tried by a Jury, with his attorney representing him at such trial; and the Jury having brought in its Verdict finding the Defendant guilty of all of the above offenses; and said Jury, after having heard additional evidence, rendered its Advisory Sentence recommending death in connection with the crime of Murder of the First Degree; and the Court having adjudicated said Defendant guilty of said offenses and filed its Findings of Fact herein; and the Defendant being asked by the Court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence, it is therefore,

CERTIFIED A TRUE COPY
[illegible] CLERK

[illegible] 81 C-

State of Florida
vs
Paul Edward Magill

C032-262

THE JUDGMENT, ORDER AND SENTENCE of the Court as to the offense of First Degree Murder that the Defendant, PAUL EDWARD MAGILL, be electrocuted until dead as directed by the laws of the State of Florida.

DONE AND ORDERED in open Court at Ocala, Marion County, Florida, this 26 day of JANUARY, 1981.

WILLIAM T. SWIGERT
Circuit Judge

CERTIFIED A TRUE COPY
FRANCES E. THORTON, CLERK
BY [illegible] D.C.

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR MARION COUNTY
CRIMINAL ACTION

STATE OF FLORIDA

Case No: 77-19

vs

PAUL EDWARD MAGILL,

Defendant.

## FINDINGS OF FACT

THIS CAUSE coming on this day to be considered pursuant to the provisions of Florida Statutes 921.141, after (1) the conviction of the Defendant, PAUL EDWARD MAGILL, of unlawfully, with premeditated design, causing the death of KAREN SUE YOUNG, by killing and murdering her while engaged in the perpetration of a crime, by shooting her with a firearm, to wit: a .44 magnum revolver, in violation of Florida Statutes 782.04; (2) the conviction of said Defendant of committing an unlawful sexual battery upon one KAREN SUE YOUNG, and in the process thereof using or threatening to use a deadly weapon, to wit: a .44 magnum revolver, in violation of Florida Statutes 794.011(3); and (3) the conviction of said Defendant of the crime of robbery by force, violence, or assault, or putting in fear, said property belonging to Braxton Jones, Inc., doing business as Jiffy Food Store#2500, and in the course of said robbery carrying a firearm, to wit: a .44 magnum revolver, in violation of Florida Statutes 812.13.

In connection with the above, the Court is in receipt of a Pre-Sentence Investigative Report on said Defendant and a copy of same, including all portions thereof, and for emphasis it is stated that the confidential portion thereof is included by this reference, has been furnished to the State of Florida and to the Defendant and to his Attorney, and the Court being in receipt of the Advisory Sentence by the twelve person Jury as provided for in Florida Statute 921.141, which advisory report found: (a) That sufficient

CERTIFIED A TRUE COPY

State of Florida
vs.
Paul Edward Magill

aggravating circumstances exist in the above case of First Degree Murder to warrant the imposition of the sentence of death, and (b) that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and therefore, the Jury recommended a sentence of death on said Defendant, and after studing, considering and weighing all of the above, the Court finds and makes and sets forth the following findings of fact:

1. That three felonies, namely, Murder in the First Degree, Involuntary Sexual Battery and used or threatened to use in the process thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant, PAUL EDWARD MAGILL.

2. The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape.

3. The said capital felony was especially heinous, atrocious, and cruel, as there existed no logical or compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind.

4. The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain.

5. That the Defendant, PAUL EDWARD MAGILL, proved the following mitigating circumstances, to wit:

(a) the evidence shows that defendant Magill was 17 years of age at the time of the offense charged.

(b) that the defendant Magill had no significant prior criminal record

(c) The defendant's father passed away on Oct 28, 1975.

6. That the Defendant, PAUL EDWARD MAGILL failed to establish by evidence any other mitigating circumstances.

7. The Jury who heard said trial also heard all the facts and circumstances concerning aggravating and mitigating circumstance and after argument of counsel and instructions by the Court,

State of Florida
vs
Paul Edward Magill

rendered an Advisory Sentence recommending death as the penalty for the commission of the said Murder.

Based upon the above facts, findings and circumstances, and the other matters as reflected in the record and the pre-sentence investigation, the Court hereby concludes that the advisory sentence of the Jury should be followed and that the death sentence should be imposed upon said Defendant.

DATED THIS 26 day of JANUARY, 1981.

William T. Swigert

WILLIAM T. SWIGERT,
Circuit Judge

# Supreme Court of Florida

No. 51,699

PAUL EDWARD MAGILL, Appellant,

v.

STATE OF FLORIDA, Appellee.

[March 10, 1983]

ADKINS, J.

We have for review a sentence of death imposed by a trial court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant, Paul Edward Magill, was charged with and convicted of first-degree murder and was sentenced to death. On appeal, this Court affirmed the conviction but vacated the sentence and remanded the cause with directions that the trial court make proper findings of fact and then impose an appropriate sentence. Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 917 (1981), (Magill I).

On resentencing, the trial court found applicable four aggravating factors and three mitigating ones and again sentenced appellant to death. This appeal of the resentencing followed.

As his first point on appeal, appellant contends that the trial court erred in finding that the murder was especially heinous, atrocious, and cruel. See § 921.141(5)(h), Fla. Stat. (1977). In our opinion in Magill I, however, we found no fault with this finding by the trial court, and we adhere to our earlier conclusion.

-D-

The next point raised is that the term "heinous, atrocious, and cruel" has become unconstitutionally vague and overbroad because of the wide variety of situations in which it has been applied. Appellant argues that in the time since the term was held constitutional by the United States Supreme Court in Profitt v. Florida, 428 U.S. 242 (1976), the "various and diverse interpretations and applications made of it by this Court" have rendered it no longer clear to a person of average intelligence. Appellant supports his argument by reference to several cases which involve what he considers similar factual situations, yet which reach different results regarding the applicability of section 921.141(5)(h).

Appellant's argument ignores that there are discernable distinctions in the facts of the cases which he cites. It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing. Thus while both officers in Raulerson v. State, 358 So.2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978), and Fleming v. State, 374 So.2d 954 (Fla. 1979), were killed by one gunshot, the situations in which the killings occurred were distinguishable. The surrounding circumstances in Raulerson warranted finding section 921.141(5)(h) applicable, while those in Fleming did not.

There can be no mechanical, litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.

We have provided guidance for determining whether section 921.141(5)(h) is applicable. As was noted in State v. Dixon, 283 So.2d 1 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. Since Proffitt, our application of the above reasoning has not rendered the statute unconstitutionally vague and overbroad.

Appellant next argues that the trial court erred in finding applicable three of the aggravating circumstances. He argues that the first, second, and fourth aggravating factors are supported by the same evidence and thus are improperly cumulative. See Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). The validity of these aggravating circumstances was approved of in Magill I and was not a factor in our remand to the trial court. We need not, therefore, address this issue.

Appellant's fourth point on appeal is that the three mitigating circumstances found applicable by the trial judge outweigh the aggravating circumstances and so the death sentence should be vacated and a sentence of life imprisonment imposed instead. He argues that the mitigating factors are quite compelling while the aggravating ones are either inapplicable or insignificant. We do not agree.

The findings in aggravation were approved in our opinion in Magill I. The factors established in section 921.141(5) must be proven by the state before they can be applied by the court in sentencing. Four such factors were found applicable, and we cannot say that they do not carry as much weight as the mitigating factors that were applied. If we are to question the factors considered in sentencing, then two of the mitigating

circumstances found applicable, that appellant lacked a significant prior criminal record and that his father had died one year earlier, seem as questionable as any accepted in aggravation. Regardless of that, the trial court used reasoned judgment, specified which factors it considered, and followed the jury's recommendation in sentencing. In such a case, we do not feel warranted to substitute our own judgment for that of the sentencing court.

As his final point, appellant argues that if this Court does not vacate the death sentence, the case should be remanded for a new sentencing hearing. If even one of his arguments concerning the validity of the aggravating circumstances is correct, claims appellant, then a new sentencing hearing is warranted. He cites our opinion in Fleming v. State, 374 So.2d 954 (Fla. 1979), where upon ruling that an aggravating factor was erroneously applied, we remanded for resentencing "[s]ince we are unable to determine what significance this factor was given in the weighing process. . . ." Id. at 959. Because, however, we find no fault with the aggravating circumstances applied, this issue need not be addressed.

Having considered each point raised by appellant, and finding that none warrant reversal or remand, the trial court's sentence is hereby affirmed.

It is so ordered.

ADKINSON, C.J., OVERTON and McDONALD, JJ., Concur
BOYD, J., Concurs in part and dissents in part with an opinion

NO FURTHER UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

BOYD, J., concurring in part and dissenting in part.

Although I agree with portions of the majority opinion, I disagree with the final result. I agree with the majority's conclusion that the term "heinous, atrocious, or cruel" has not become unconstitutionally vague and is applicable to this case. See Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). However, I find that the trial judge erred in doubling up some of the aggravating circumstances and in not giving sufficient weight to the mitigating circumstance of appellant's age. Since the mitigating circumstances in this case outweigh the aggravating, I would vacate the death sentence and order that appellant be sentenced to life imprisonment.

I disagree with the majority's conclusion that we need not address the issue of the applicability of three of the aggravating circumstances. Contrary to what the majority opinion intimates, this Court did not previously specifically approve the validity of all the aggravating circumstances found by the trial court. In its original findings of fact in support of the death sentence, the trial court found:

> 1. That three felonies, namely, Murder in the First Degree, Involuntary Sexual Battery and used or threatened to use in the process thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant, PAUL EDWARD HAMILL.
>
> 2. The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape.
>
> 3. The said capital felony was especially heinous, atrocious, and cruel, as there existed no logical or compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind.
>
> 4. The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain.

On appeal we stated that the "trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified." Hamill v. State, 366 So.2d 1138, 1141 (Fla. 1980), cert. denied, 450 U.S. 927 (1981). This statement was true because the judge's findings established the existence of at least one aggravating

circumstance. However, we did not specify which statutory aggravating circumstances the trial judge's findings supported as there was no need to. We remanded so that the trial judge could specifically list the mitigating circumstances which he may or may not have considered.

On remand the trial judge mentioned verbatim the same aggravating circumstances he listed in his original findings of fact. In addition he found:

> That the Defendant, PAUL EDWARD MAGILL, proved the following mitigating circumstances, to wit:
>
> (a) the evidence shows that defendant Magill was 17 years of age at the time of the offense charged;
>
> (b) that the defendant Magill had no significant prior criminal record;
>
> (c) the defendant's father passed away on Dec. 28, 1975.

Because the trial judge did find some mitigating circumstances existed, the weight to be attached to the aggravating circumstances, instead of their mere existence, becomes the critical factor in determining whether the death penalty is justified. It is therefore incumbent upon us to review the trial judge's entire sentence to ensure that his conclusions are correct.

In reviewing the trial judge's findings of fact, I am somewhat confused as to the meaning and purpose of his first finding which basically states that appellant committed first-degree murder, sexual battery, and robbery. This finding does not allude to any of the statutory aggravating circumstances. Appellant argues that this finding should not be used to establish a separate aggravating circumstance as it merely duplicates the trial judge's second finding that the capital felony was committed while appellant was engaged in the commission of, or flight after committing, the crimes of robbery and rape. Appellant further argues that if by any chance the trial judge meant for this finding to be the basis for the aggravating circumstance that appellant had previously been

convicted of a felony involving the use or threat of violence against a person under section 921.141(5)(b), Florida Statutes (1981), then the trial judge erred because this finding refers to the "same aspect" which is the basis for finding that the crime was committed during a felony. See Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). The state seems to have conceded this point by ignoring these arguments. In its answer brief the state fails to mention the trial judge's first finding, but instead argues that the trial judge did not err in finding as separate aggravating circumstances that the capital felony was committed during a violent felony, that it was committed for pecuniary gain, and that it was especially heinous, atrocious, and cruel.

I agree with the state's contention that the trial judge's findings support the existence of three separate statutory aggravating circumstances. However, I also agree with appellant's contention that the trial judge must have also relied upon his first finding as an additional aggravating circumstance. Otherwise there would have been no purpose in listing appellant's convictions for first-degree murder, sexual battery, and robbery as a separate finding. Because the trial judge improperly relied upon this additional finding as an aggravating circumstance, he had to have attached too much weight to the aggravating circumstances when he compared them to the mitigating circumstances.

The trial judge also erred by not giving enough weight to the mitigating circumstances. At the penalty phase of the trial, appellant's mother testified that appellant, who was the youngest of three sons, was the only one still living at home at the time he committed the murder. She testified that appellant's father, to whom appellant was very close, died unexpectedly on December 28, 1975, and that after his death a change came over appellant. On resentencing, appellant's mother elaborated that after appellant's father's death, appellant began experiencing inner turmoil. Afterwards appellant's counsel argued that this

evidence was sufficient proof that appellant was under severe emotional distress at the time of the incident. The state argued against such a finding. Although the trial court did not accept appellant's contention that he was under emotional distress, the court did find the death of appellant's father to be a mitigating circumstance.

As additional mitigating circumstances, the trial court also found that appellant had no significant history of prior criminal activity and that he was only seventeen years old at the time of the offense. Appellant's age should have been given greater weight in mitigation in light of the fact that he was a dependent minor who was still living at home. This Court has thus far vacated the death sentence of every defendant who has been under the age of eighteen. See Tasil v. State, 374 So.2d 465 (Fla. 1979), cert. denied, 446 U.S. 967 (1980); Bryan v. State, 367 So.2d 616 (Fla. 1979); Thompson v. State, 328 So.2d 1 (Fla. 1976). That is not to suggest that the death penalty should never be imposed on a minor. However, because of society's special concern for its juveniles, great significance should be attached to the fact that a person accused of a capital felony is a minor, especially a minor who is unemancipated.

Therefore appellant's age, along with the facts that he had no significant history of prior criminal activity and that he began suffering a personality disorder when his father died, are sufficient mitigating circumstances to outweigh the aggravating circumstances found to exist. I would therefore order that appellant's sentence be reduced to life imprisonment without eligibility for parole for twenty-five years.

An Appeal from the Circuit Court in and for Marion County,

William T. Swigert, Sr., Judge - Case No. 77-19CF

Philip J. Padovano and Mary M. Piccard, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General and Barbara Ann Butler, Assistant Attorney General, Jacksonville, Florida,

for Appellee

# CHAPTER 782

# HOMICIDE


782.02 Justifiable use of deadly force.
782.03 Excusable homicide.
782.04 Murder.
782.07 Manslaughter.
782.071 Vehicular homicide.
782.08 Assisting self-murder.
782.09 Killing of unborn child by injury to mother.
782.11 Unnecessary killing to prevent unlawful act.


**782.02 Justifiable use of deadly force.**—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—ss. 4, 5, ch. 1637, 1868; RS 2378; ch. 4987, 1901; s. 1, ch. 4864, 1901; GS 2280; RGS 5030; CGL 7128; s. 68, ch. 74-383; s. 1, ch. 79-341; s. 48, ch. 79-400.

**782.03 Excusable homicide.**—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—s. 6, ch. 1637, 1868; RS 2379; GS 2281; RGS 5031; CGL 7129; s. 1, ch. 79-13.

**782.04 Murder.**—

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 2, ch. 1637, 1868; RS 2380; GS 2282; RGS 5032; s. 1, ch. 6470, 1911; CGL 7130; s. 1, ch. 28023, 1953; s. 712, ch. 71-136; s. 3, ch. 72-724; s. 14, ch. 74-383; s. 6, ch. 75-298; s. 1, ch. 76-161; s. 200, ch. 79-400.

**782.07 Manslaughter.**—The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—RS 2384; GS 2286; RGS 5036; CGL 7141; s. 715, ch. 71-136; s. 180, ch. 73-333; s. 18, ch. 74-383; s. 6, ch. 75-298.

cf.—s. 948.01 Death caused by operation of motor vehicle while intoxicated

**782.071 Vehicular homicide.**—"Vehicular homicide" is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. Vehicular homicide is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 10, ch. 74-383; s. 6, ch. 75-298.

cf.—s. 948.01 Death caused by operation of motor vehicle while intoxicated

**782.08 Assisting self-murder.**—Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 3, ch. 1637, 1868; RS 2385; GS 2287; RGS 5037; CGL 7142; s. 716, ch. 71-136.

**782.09 Killing of unborn child by injury to mother.**—The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—ss. 10, ch. 1637, 1868; RS 2386; GS 2288; RGS 5038; CGL 7143; s. 717, ch. 71-136.

**782.11 Unnecessary killing to prevent un-**

# CHAPTER 921

# SENTENCE


921.09 Fees of physicians who determine sanity at time of sentence.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.

921.15 Stay of execution of sentence to fine; bond and proceedings.

921.16 When sentences to be concurrent and when consecutive.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.

921.18 Sentence for indeterminate period for noncapital felony.

921.185 Sentence; restitution a mitigation in certain crimes.

921.20 Classification summary; Parole and Probation Commission.

921.21 Progress reports to Parole and Probation Commission.

921.22 Determination of exact period of imprisonment by Parole and Probation Commission.

921.231 Presentence investigation reports.

921.241 Felony judgments; fingerprints required in record.

921.242 Subsequent offenses under chapter 796; method of proof applicable.


**921.09 Fees of physicians who determine sanity at time of sentence.**—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 121, ch. 19264, 1939 CSL; 1949 Supp. 919.09(1); s. 121, ch. 70-339.

**921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.**—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 121, ch. 19264, 1939 CSL; 1949 Supp. 919.09(2); s. 121, ch. 70-339.

**921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.**—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 271, ch. 19554, 1939 CGL 1940 Supp. 8007(340); s. 119, ch. 73-333; s. 1, ch. 73-72; s. 2, ch. 73-724; s. 1, ch. 74-379; s. 348, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 78-382.

Note.—Former s. 918.12.

**921.142 Appearance of victim to make statement at sentencing hearing; submission of written statement.—**

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—s. 2, ch. 78-374.

**921.15 Stay of execution of sentence to fine; bond and proceedings.—**

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 2220, ch. 10324, 1925 CGL 5482, 5487; CGL 1940 Supp. 8007(340); s. 119, ch. 73-333.

**921.16 When sentences to be concurrent and when consecutive.—**

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall

RECEIVED
MAY 9 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6733

PAUL EDWARD MAGILL

Petitioner,

v.

STATE OF FLORIDA

Respondent.

Supreme Court, U.S.
FILED
MAY 6 1983
Alexander L. Stevas, Clerk

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA**

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

Pursuant to Rule 46.1 of this Court, Motion is hereby made that Petitioner be allowed to proceed in Forma Pauperis. Petitioner's affidavit is attached to this Motion. Leave to proceed in Forma Pauperis was sought and obtained in all of the State Court proceedings below.

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

ATTORNEY FOR PETITIONER

RECEIVED
MAY 9 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. _____

PAUL EDWARD MAGILL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

**PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT**

AFFIDAVIT IN SUPPORT OF THE MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA
COUNTY OF LEON

BEFORE ME personally appeared Philip J. Padovano who being first duly sworn deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of the Florida Supreme Court dated March 10, 1983.

2. The undersigned attorney represented the Petitioner Magill in the Petition for Writ of Certiorari to the Florida Supreme Court in its opinion on the direct appeal in this case and in all subsequent proceedings. The Petitioner executed an affidavit in support of his Motion for Leave to Proceed in Forma Pauperis on December 1, 1980 in support of the first petition filed in this Court.

3. The undersigned counsel has direct knowledge of the fact

that the Petitioner Magill has been incarcerated continuously in the State of Florida from the date of the first affidavit until the filing of this Petition. The Petitioner Magill has not been employed since that date nor has he acquired sufficient funds to pay the costs of this proceeding.

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

ATTORNEY FOR PETITIONER

Sworn to and subscribed
before me this 6th day of May
1983.

Notary Public

Commission expires:

Form 4 Affidavit Requested

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

No.: A-306 & A-307

PAUL EDWARD MAGILL,
Petitioner,
v.
THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA
COUNTY OF BRADFORD

Before me personally appeared Paul Edward Magill, who being first duly sworn, deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of a Florida Supreme Court.

2. I am a citizen of the United States, presently confined at the Florida State Prison.

3. Because of my poverty, I am unable to pay the costs of these proceedings or to give security therefor.

4. I am seeking Appellate review on the merits to determine whether my criminal conviction should be reversed. I believe I am entitled to redress and I am submitting this Affidavit in good faith. A more detailed statement as to the grounds on which I believe I am entitled to redress has been set forth in the Petition for Writ of Certiorari filed along with this Motion and Affidavit.

5. I was declared to be insolvent and represented by Court-appointed Counsel in both the Trial and Appellate proceedings

held in the Florida Courts. I have continuously remained in custody since the date of my arrest on December 23, 1976 and since that time, I have not acquired any source of income or otherwise acquired any money or property.

Paul Magill

PAUL EDWARD MAGILL

SWORN TO and SUBSCRIBED before me this 1st day of December, 1980.

(SEAL)

NOTARY PUBLIC

My commission expires: NOTARY PUBLIC, STATE OF FLORIDA AT LARGE MY COMMISSION EXPIRES JUNE 16, 1984

PHILIP J. PADOVANO
Post Office Box 527
Tallahassee, Florida 32302
(904) 224-2821

ATTORNEY FOR PETITION, PAUL EDWARD MAGILL

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

No. 82-6733

RECEIVED
JUN 4 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PAUL EDWARD MAGILL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF FLORIDA

COUNTY OF BRADFORD

Before me personally appeared Paul Edward Magill, who being first duly sworn, deposes and says:

1. This is an Affidavit in support of a Motion for Leave to Proceed in Forma Pauperis in the Supreme Court of the United States on a Petition for Writ of Certiorari requesting review of a judgment of a Florida Supreme Court.

2. I am a citizen of the United States, presently confined at the Florida State Prison.

3. Because of my poverty, I am unable to pay the costs of these proceedings or to give security therefore.

4. I am seeking appellate review on the merits to determine whether my criminal conviction should be reversed and to

determine whether the judgment and sentence of death should be vacated. I believe I am entitled to redress and I am submitting this Affidavit in good faith. A more detailed statement as to the grounds on which I believe I am entitled to redress has been set forth in the Petition for Writ of Certiorari filed along with this Motion and Affidavit.

5. I was declared to be insolvent and represented by Court-appointed Counsel in both the trial and appellate proceedings held in the Florida courts. I have continously remained in custody since the date of my arrest on December 23, 1976 and since that time, I have not acquired any source of income or otherwise acquired any money or property.

Paul Magill
PAUL EDWARD MAGILL

SWORN TO and SUBSCRIBED before me this 31 day of May, 1983.

(Seal)

Bernice Hannagle
Notary Public

My Commission Expires:

[illegible]

PHILIP J. PADOVANO
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

ATTORNEY FOR PETITIONER
PAUL EDWARD MAGILL